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In the Supreme Court of the United States

October Term, 1980

FEDERAL ENERGY REGULATORY COMMISSION and JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

v.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Brief of Amici Curiae, Duke Power Company and Carolina Power & Light Company In Support of Appellees

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THE INTEREST OF THE AMICI CURIAE

Amici Curiae, Duke Power Company and Carolina Power & Light Company, are electric utilities subject to regulation of their retail rates and service practices by the North Carolina Utilities Commission and the South Carolina Public Service Commission. The Amici are included on the final list, 44 Fed. Reg. 17448 (1979), of electric utilities which are covered by the Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"). Under the provisions of PURPA the Amici are subject to substantial costs to which they would otherwise not be subject. For example, the Amici must incur substantial costs in developing and reporting cost-of-service data to satisfy requirements imposed by Section 133 of PURPA, 16 U.S.C. §2643 (Supp. III 1979), which requirements have been characterized recently by the Comptroller General of the United States as "burdensome and costly to utilities, and of little current use to States and intervenors." U.S. COMPTROLLER GENERAL, BURDENSOME AND UNNECESSARY REPORTING REQUIREMENTS OF THE PUBLIC UTILITY REGULATORY POLICIES ACT NEED TO BE CHANGED (Rep. to U.S. Congress, Doc. No. EMD 81-105, 1981).

The Amici file this brief in order to support the Appellees' effort to obtain a declaration of invalidity of the provisions of PURPA creating these unnecessary burdens imposed on utilities and unconstitutionally interfering with the role of the states in regulating retail rate structures and service practices of electric utilities.

SUMMARY OF ARGUMENT

The United States Constitution and the Tenth Amendment thereto provide for and guarantee a federal system of government wherein the states retain those powers and attributes of sovereignty not specifically delegated to the federal

government. Titles I and III and Section 210 of PURPA, [1] under the guise of regulating interstate commerce, do irreparable violence to this federal system and render the federal concept all but meaningless. Under the principles recently enunciated by this Court in *Hodel v. Virginia Surface Mining & Reclamation Association,* U.S. , 69 L. Ed. 2d 1 (1981), and in previous cases, such portions of PURPA are plainly unconstitutional. PURPA not only candidly provides that it "supplements" state law, it commandeers state utility regulatory agencies and compels them to consider and sometimes adopt federal policies and standards on retail utility rates and service practices, under procedures and schedules also dictated by PURPA. Instead of regulating the utilities, PURPA regulates the states as states with respect to matters which are clearly attributes of state sovereignty and thus impairs the ability of the states to structure their integral governmental operations. Although Congress might have acted in alternative, permissible ways to implement the standards set forth in PURPA, it did not do so. Instead, Congress elected to enact legislation by which essentials of state sovereignty are "devoured."[2] Neither Appellants nor any amici curiae have been able to point to anything in the Commerce Clause or any other constitutional provision, the decisions of this Court, or any extraordinary or overriding federal interest or other circumstance authorizing or justifying Congress in such action. It is therefore respectfully submitted that the portions of PURPA here involved are unconstitutional and that the lower court should be affirmed in so holding.

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[1]Title I of PURPA is codified at 16 U.S.C. §2601 *et seq.* (Supp. III 1979); Title III is codified at 15 U.S.C. §3201 *et seq.* (Supp. III 1979); Section 210 is codified at 16 U.S.C. §824a-3 (Supp. III 1979). For purposes of brevity, these code citations are not repeated for every reference to Title I, Title III or Section 210.

[2]By enacting PURPA, Congress ignored the stated concern of this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that "such assertions of power, if unchecked, would indeed, as Mr. Justice Douglas

(continued)

ARGUMENT

I. CONTROLLING LEGAL PRINCIPLES

This Court recently stated the legal principles controlling challenges to federal legislation which is asserted to contravene the requirements of the Tenth Amendment to the United States Constitution.[3] On June 15, 1981, in *Hodel v. Virginia Surface Mining & Reclamation Association,* U.S. , 69 L. Ed. 2d 1 (1981), the Court characterized its decision in an earlier landmark case, *National League of Cities v. Usery,* 426 U.S. 833 (1976), as establishing the analytical principles to apply in such Tenth Amendment challenges. The test set forth in *Hodel* requires the challenger to satisfy each of three requirements.

> First, there must be a showing that the challenged statute regulates the "States as States" [*Usery supra*] at 854, 49 L Ed 2d 245, 96 S Ct 2465. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.,* at 845, 49 L Ed 2d 245, 96 S Ct 2465. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.,* at 852, 49 L Ed 2d 245, 96 S Ct 2465.

69 L. Ed. 2d at 23.

Once these requirements are met, it must then be determined whether an extraordinary situation exists in which "the nature of the federal interest advanced may be such that it justifies State submission." *Id.* at n.29.

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cautioned in his dissent in Wirtz, allow 'the National Government [to] devour the essentials of state sovereignty,' [392 U.S. 183, 205 (1968)] and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause." 426 U.S. at 855.

[3]The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This brief now applies those principles and demonstrates that the provisions of PURPA at issue violate the Tenth Amendment.

II. TITLES I AND III AND SECTION 210 OF TITLE II OF PURPA ARE UNCONSTITUTIONAL IN THAT THEY IMPERMISSIBLY REGULATE THE STATES AS STATES

The portions of PURPA properly declared unconstitutional by the lower court represent an unprecedented and impermissible attempt by Congress, on the pretext that it is regulating interstate commerce, to take direct control of an important aspect of state government. Although Appellants attempt to cast the issue in terms of Congress' power under the Commerce Clause, U.S. CONST. art. I §8, cl. 3, the question is not whether Congress has power to regulate interstate commerce but whether in regulating or purporting to regulate interstate commerce it may regulate the states as states. Even assuming arguendo that the intrastate generation and retail sale of electricity by state-regulated utilities either is in, or substantially affects, interstate commerce (although there is no finding in PURPA to that effect), so that such intrastate generation and retail sales are a proper *subject matter* for the exercise of Congress' commerce power, the inquiry is not ended. It is also necessary to examine the *manner* in which Congress exercised its power, including the nature of the entities sought to be regulated.

In that regard, *Usery* established beyond question that "the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce." 426 U.S. at 854. The Court also said:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite

> another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

426 U.S. at 845.

In accordance with the principles just quoted, it is necessary to determine whether PURPA attempts to regulate the "States as States." It is respectfully submitted that the portions of PURPA involved here could hardly be a more obvious attempt to regulate the states as states. It is necessary only to examine Subtitle B of Title I, which contains the substantive federal standards sought to be imposed, to reach that conclusion. That subtitle contains mandates addressed to only two kinds of entities—non-regulated utilities and state utility regulatory agencies. There is no directive addressed to any state-regulated electric utility.[4] Such utilities account for the vast majority of retail sales of electricity, and state regulatory agencies generate and sell no electricity at all. If the activity of generating electricity intrastate and selling it at retail triggers the applicability and exercise of Congress' commerce power, and if PURPA is indeed intended to regulate commerce, then PURPA's regulatory provisions should be directed to the entities primarily engaged in such activity, *i.e.*, regulated utilities.

Instead, Titles I and III and Section 210 of PURPA seek to regulate the states' regulatory agencies. The mandates to such agencies are numerous and have been discussed in the Motions to Affirm filed by Appellees and in amicus curiae

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[4]Subtitle D, Section 133, referred to *supra* at page 1, appears to contain the only mandate directed to regulated utilities.

briefs filed in support of Appellees. *Inter alia,* the agencies are required to consider federal standards, required to hold hearings to do so, required to honor a request by virtually anyone that such consideration be made, required to apply federal rules and definitions set forth in the Act in making such consideration and required to reach certain dictated conclusions. Section 210 is a particularly blatant regulation of the states as states in that it flatly requires all state utility regulatory agencies to *implement* rules promulgated by the Federal Energy Regulatory Commission ("FERC"). Moreover, FERC is empowered by Section 210(h) (2) (A) of the Act to compel compliance with this provision by the state regulatory commissions subject to the rule. 16 U.S.C. §824a-3(h) (2) (A) (Supp. III 1979).

With respect to Titles I and III, Appellants attempt to avoid the impact of the obvious regulation of the states as states by reliance on the so-called "freedom" of the states to decline to adopt the federal standards. Apart from the fact that the congressionally-forced consideration of federal standards is itself an improper regulation of the states as states, the freedom argued for by Appellants is really not freedom at all. If a state regulatory agency exercises this "freedom of choice" against adopting the federal standards, it must set forth its reasons for such determination, after which the determination is subject to review in "the appropriate State court." Section 123(c) of PURPA, 16 U.S.C. §2633(c) (Supp. III 1979). It is an illusory freedom of choice which is subject to review and reversal by a higher and final authority. In fact, if Congress had intended to give the states freedom of choice regarding adoption of the federal standards, the provision for court review of state agency determinations would have been unnecessary and would not have been included in the Act.

Furthermore, the narrow focus urged by the Appellants ignores *mandatory* revision of the procedural rules of state agencies required by Titles I and III. As is discussed *infra,* the

unfettered discretion of states to adopt their own procedural rules is an integral operation of government.

Appellants' reliance on *Hodel* is misplaced. Indeed, that case supports Appellees, as is demonstrated by the following description by this Court of the effect on the states of the statute construed in that case, the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 *et seq.* (Supp. III 1979) ("Surface Mining Act"):

> Moreover, the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

69 L. Ed. 2d at 23-24.

It is even clearer on closer examination that the effects of the Surface Mining Act under consideration in *Hodel* and of the portions of PURPA involved here are in no way analogous and in fact are entirely different with respect to the role of the states. Under the Surface Mining Act, the Secretary of the Interior promulgates regulations establishing an interim regulatory program for surface mining operations in each state. The Secretary is responsible for enforcing the interim program; the states are not required to do so. The interim program remains in effect in a state until a permanent program is implemented. The Secretary is also required to promulgate regulations establishing a permanent program and standards. Any state wishing to assume permanent regulatory control over surface mining operations within its borders may, but is not required to, submit a plan for approval by the Secretary. If

such plan is approved, the state thereafter implements and enforces it. As to any state whose plan is not approved or which fails to submit a plan, the permanent federal program, implemented and enforced completely by the federal government and with no state government involvement whatever, is in effect.

These factors demonstrate that the Surface Mining Act does not compel state agencies to take any action, for which reason this Court held in *Hodel* that there was no violation of the Tenth Amendment. PURPA, however, is undisguised compulsion of state government agencies to take various regulatory actions, and the *Hodel* case thus in no way supports the validity of PURPA.

PURPA is also in sharp contrast to other types of legislation by which Congress, without preempting an area completely, seeks to have the states adopt or abide by federal policies and standards. In such cases, federal funds are typically used as the incentive for states *voluntarily* to comply with the federal policies and standards, *i.e.*, federal funds are granted to states which elect to comply with federal standards and withheld from those which do not.[5] Congress employed no such approach in PURPA, however, but rather opted for sheer coercion.

The circumstances and legal issues most similar to those involved in PURPA and in this appeal were present in *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated and remanded sub nom., EPA v. Brown*, 431 U.S. 99, *reinstated in part and remanded in part sub nom., District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977), in which

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[5]For example, the Secretary of Transportation is directed not to approve any highway project submitted by a state (and therefore not to disburse federal highway funds to such state), unless the state is enforcing a maximum speed limit of 55 miles per hour on all public highways within its borders. Federal Highway-Aid Amendments of 1974, 23 U.S.C. §154 (1976).

the United States Court of Appeals for the District of Columbia Circuit had before it various regulations of the Environmental Protection Agency ("EPA") applicable to Maryland, Virginia and the District of Columbia and relating to air pollution caused by motor vehicles. With regard to some of the regulations, the Court found that it could determine, on the basis of statutory construction of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 *et seq.* (1976) ("Clean Air Act"), whether such regulations were within the authority of the EPA, thereby making it unnecessary to reach constitutional issues. For example, the Court held: "By ordering the states to enact and submit regulations after their initial plans were found to be inadequate, rather than promulgating his own regulations directly controlling sources of air pollution, the Administrator has thus exceeded the authority conferred upon him by Section 110(c) of the Clean Air Act." 521 F.2d 986.

With regard to the power of the federal government to force the states to administer EPA-promulgated transportation control programs, the Court held that the Clean Air Act itself does not specifically preclude such power, so that the Court was required to consider plaintiffs' constitutional challenge to the regulations. The Administrator's regulations concerning the inspection, maintenance and retrofit of motor vehicles each contained a provision prohibiting all persons from operating nonconforming vehicles, which the Court found to be proper. However, such regulations also included "provisions ordering the states to enact statutes and to establish and administer programs to force their citizens to comply with this federal directive." 521 F.2d at 990.

The Court held:

> [T]he Administrator, in the exercise of federal power based solely on the commerce clause, cannot against a state's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by

> the Administrator. For example, the attempt to require the state to "establish" each of the retrofit programs, and to "evaluate and approve devices for use in this program," . . . is an impermissible encroachment on state sovereignty and goes beyond "regulation" by the Congress. It seeks, under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation. If the federal government wants to impose a program under federal authority, it is limited by the restrictions applicable thereto.
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> . . . .
>
> In essence, the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles. . . . Under the regulations here, the states are to function merely as departments of the EPA, following EPA guidelines and subject to federal penalties if they refuse to comply or if their regulation of vehicles is ineffective. We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.

521 F.2d at 992.

The Court also discussed the Tenth Amendment, stating that "the extent of federal intrusion into state sovereignty is of some relevance even where the federal regulations are an exercise of the commerce power." 521 F.2d at 994. The Court held that the regulations in question violated the Tenth Amendment:

> [W]e have no doubt that the inspection and retrofit regulations involve "drastic" intrusions on state sovereignty. A federal regulation which compels the states to enforce federal regulatory programs clearly "impairs the States'

> integrity" and "their ability to function in a federal system." The Tenth Amendment thus provides an additional ground for striking down these particular regulations.

521 F.2d at 994 (footnote omitted).

In *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), similar regulations were before the United States Court of Appeals for the Ninth Circuit, some of which included "the power to direct that a state either enact such laws to control air pollution as the Administrator might require, or administer and enforce such regulations as the Administration [sic] might properly promulgate." 521 F.2d at 838. The Court decided that, as a matter of statutory construction, the Clean Air Act did not authorize the Administrator to promulgate such regulations. The Court also stated that it was reluctant to adopt the contrary interpretation because of the serious constitutional issues which would be involved under the Tenth Admendment. The Court discussed the distinction between commerce and the governmental power to regulate commerce. The Court said:

> To treat the governance of commerce by the states as within the plenary reach of the Commerce Power would in our opinion represent such an abrupt departure from previous constitutional practice as to make us reluctant to adopt an interpretation of the Clean Air Act which would force us to confront the issue. Such treatment, for example, would authorize Congress to direct the states to regulate any economic activity that affects interstate commerce in any manner Congress sees fit.... A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress.

521 F.2d at 839.

This Court granted certiorari to review the *Brown* case, the *Train* case, *supra*, *Arizona v. EPA*, 521 F.2d 825 (9th Cir. 1975) and *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), the latter two of which had also held invalid various regulations of

the EPA. In its per curiam opinion, *EPA v. Brown*, 431 U.S. 99 (1977), this Court said that the federal parties appeared to admit that the only regulations remaining before the Court were invalid unless modified in certain respects. In the brief filed by the Solicitor General on behalf of the federal parties, it was stated: "'The Administrator. . . concedes the necessity of removing from the regulations all requirements that the States submit legally adopted regulations. . . .'" 431 U.S. at 103. The Court thus declined "to pass upon the EPA regulations, when the only ones before us are admitted to be in need of certain essential modifications," *Id.*, and the cases were remanded for consideration of mootness. However, such admission by the Solicitor General in *EPA v. Brown* is highly persuasive and relevant here with respect to the validity of those portions of PURPA which purport to direct the states, through their utility regulatory agencies, to take certain actions to regulate the utilities under their jurisdiction.

Appellants and various amici curiae have stated that, under the commerce power, Congress could have preempted completely the field of utility regulation. Such a statement reflects the view, characterized with implicit disapproval by Justice Rehnquist, that "the federal system exists only at the sufferance of Congress," *Hodel, supra* at 36 (concurring opinion). However, the issue of complete federal preemption of utility regulation need not be considered here because Congress in PURPA has not preempted anything.

What Congress has attempted to do in PURPA is quite a different thing from federal preemption. When the federal government acts to preempt an area affecting interstate commerce, it not only enacts legislation and promulgates regulations and standards but also establishes the regulatory machinery to effectuate and enforce its programs. In such cases, there is no doubt that, if otherwise justified, Congress may displace the authority of the states in the area preempted. In PURPA, however, Congress has attempted to compel the

states to displace their own authority. Stated another way, Congress has sought to utilize the benefit of federal supremacy without accepting the concomitant burden of administering and enforcing the federal policies and standards it wishes to be supreme. Instead, Congress has attempted to impose that burden on the states which, it is respectfully submitted, Congress may not constitutionally do.

III. PURPA ADDRESSES MATTERS WHICH ARE INDISPUTABLY ATTRIBUTES OF STATE SOVEREIGNTY

The second requirement to apply in a Tenth Amendment challenge to a federal statute is whether the statute addresses "matters which are indisputably attributes of state sovereignty."

The Court in *Hodel* and in *Usery* did not clearly define the phrases "attributes of state sovereignty," "integral operations," "areas of traditional functions" (69 L. Ed. 2d at 23) or "integral governmental functions" (426 U.S. at 855). It can reasonably be concluded from an examination of the phrase "integral operations in areas of traditional functions" that the Court intended to differentiate "integral operations" from "traditional functions." What is not clear is whether or not the phrase "attributes of state sovereignty" (which is the crucial phrase of the second requirement specified in *Hodel*) corresponds to the phrase "integral operations" or "traditional functions" or "integral operations in areas of traditional functions" or does not precisely conform to any of these phrases. In this brief, the phrase "attributes of state sovereignty" is considered to encompass those "integral operations in areas of traditional state functions" (which phrase forms the essence of *Hodel's* third requirement), as it seems reasonable to do so from the context of *Hodel* and *Usery*.

Having established that frame of reference, the "attributes of state sovereignty" requirement is then applied to the provi-

sions of PURPA at issue. As the Appellants themselves characterize the impact of those provisions on the states:

> To be sure, the statute in suit places certain regulatory responsibilities upon the states. Some of the provisions at issue do more than "allow" state regulation. Portions of Titles I and III *require state regulatory authorities* to "consider" whether or not to adopt and implement certain regulatory standards; the *state commissions must adhere* to certain procedural requirements in considering these standards, *must permit* the Secretary of Energy to participate in the proceedings, *and must report* to the Secretary their progress in the consideration process. Section 210(f) (1) *requires the state authorities* to implement the Federal Energy Regulatory Commission's rules concerning transactions between cogenerators and electric utilities; *the Commission is empowered* under Section 210(h) (2) *to enforce* this statutory responsibility in federal court.

Brief for the Appellants at 28-29 (footnote omitted) (emphasis added).

On the basis of the Tenth Amendment and the decisions of this Court, it is clear that there are certain essential powers which a state must exercise in order to preserve its constitutionally retained sovereign status and, pursuant thereto and in the exercise of its police powers, effectively to provide such traditional services to its citizens as fire prevention, police protection, regulation of monopolies, sanitation, public health and parks and recreation. These essential powers include unfettered latitude of the state to locate its own seat of government, *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911), and to make fundamental employment decisions with respect to the personnel upon whom exercise of traditional state activities must rest, *Usery, supra.*

Also illustrative of the type of power considered by this Court to be essential to state sovereignty (and of the concomit-

ant obligation of Congress to refrain from interfering therewith) are *Ashton v. Cameron County Water Improvement District No. 1*, 298 U.S. 513 (1936), and *United States v. Bekins*, 304 U.S. 27 (1938), which involved the power of the states to control the fiscal affairs of their political subdivisions. In the *Ashton* case, the Court considered a 1934 amendment to the Bankruptcy Act of 1898, which provided for the adjustment of the debts of insolvent public bodies upon the filing of a petition in federal Bankruptcy Court. In holding that the legislation violated the Tenth Amendment, the Court stated:

> [The statute before us] undertakes to extend the supposed power of the Federal Government incident to bankruptcy over any embarrassed district which may apply to the court.
>
> If obligations of States or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them.... And really the sovereignty of the State, so often declared necessary to the federal system, does not exist.

298 U.S. at 530-531 (citations omitted).

As a result of the *Ashton* case, Congress enacted a second amendment to the Bankruptcy Act which contained additional restrictions on the ability of the Bankruptcy Court to interfere with state fiscal affairs and which was held to be constitutionally sound in *United States v. Bekins, supra*, in which the Court said: "The statute is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs." 304 U.S. at 51.

In this same category of powers or integral operations essential to state sovereignty must unquestionably be included, Amici submit, the power to enact legislation without having it supplemented by the federal government and the power to promulgate its own rules of procedure for the administrative

agencies to which it delegates responsibility for exercising traditional state activities.

A. Enacting Legislation Is An Integral Operation Of The States

It should be obvious that, of all integral operations of state government, the power to enact legislation is the most fundamental. However, Section 111(a) of PURPA, 16 U.S.C. §2621 (Supp. III 1979), forthrightly states that it "supplements" state law. State law may be enacted only by state legislators elected by the citizens of their states, and it is difficult to imagine a clearer or more improper interference with state sovereignty than Congress purporting to add to provisions of existing state law.

B. Establishing The Procedural Rules Of Its Administrative Agencies Is An Integral Operation Of The States

It is equally obvious that the freedom of the state to choose the procedural rules of the agencies it establishes to execute state activities is also an integral operation of a state.

That promulgation of its own rules of procedure is an integral operation of state government is made clear by *Davids v. Akers*, 549 F.2d 120 (9th Cir. 1977), where the Court stated as follows:

> If fixing the wages of state employees is an essential decision regarding the conduct of integral governmental functions, so, too, is the exercise by the Arizona House of Representatives of its power to adopt rules for its procedures....

Id. at 127. A state utility regulatory agency is a creation of and an arm of the state legislature, as well as a part of the executive branch of government, and, on the basis of the *Akers* case, the conclusion is inescapable that such a regulatory agency's

power to adopt procedural rules for the conduct of its own functions is an integral operation of state government and thus an attribute of state sovereignty.

Under PURPA, as acknowledged by the Appellants, state commissions "must adhere to certain procedural requirements" including requirements that the commissions consider whether to adopt and implement certain federal standards and that they allow the Secretary of Energy to participate in the state proceedings. Clearly, these mandatory federal requirements substantially interfere with one of the states' integral operations—formulation of its own rules of operation in an area which, as will be hereinafter demonstrated, is a traditional state function, *i.e.*, regulation of retail utility rates and service practices within the state.

C. Exercising The Police Power So As To Regulate Retail Rates And Service Practices Of Public Utilities Is A Traditional Function Of The States

The Appellants have themselves acknowledged that the states have traditionally regulated retail rates and service practices of electric utilities by noting that federal involvement in electric ratemaking was initiated with the passage of the Federal Water Power Act of 1920, 41 Stat. 1063 (current version at 16 U.S.C. §791 *et seq.* (1976)), "to fill gaps in state regulatory systems that were interpreted by this Court as beyond the Constitutional reach of state authorities" (Brief for the Appellants, *supra* at 30-31) and that Congress refrained from enacting a more radical statute than PURPA so as to avoid "undue interference with the *traditional authority* of *state regulatory commissions over retail utility ratemaking*." *Id.* at 32 (emphasis added).

Certainly the legislative history of PURPA supports the conclusions stated in the Appellants' brief. For example, the

Administrator of the Economic Regulatory Administration of the Department of Energy, an important federal official involved in the implementation of PURPA, gave testimony to the Congress as it reviewed the implementation of PURPA in which he admitted "the *fact* that *regulation* of retail *utility transactions* has *traditionally* been the exclusive province of *state and local governments.*" *Hearings on Oversight Pertaining to the Implementation of the Public Utilities Regulatory Policies Act of 1978 Before the Subcomm. on Energy and Powers of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 526 (1979) (statement of David J. Bardin) (emphasis added).

Also, Senator Henry Jackson (D. Wash.), who introduced the PURPA bill to the Senate, acknowledged during the Senate's deliberations on PURPA that the utility retail ratemaking process "has been traditionally wholly within the province of the States." Con. Rec. S. 17528 (October 7, 1978).

These acknowledgements that regulation of retail utility rates and service practices has been a traditional state function are well founded. A review of the relevant history indicates that substantial involvement of the states in the regulation of utilities dates back to the beginning of this century. As one expert characterizes that history:

> [U]tilities first were dealt with vigorously and comprehensively when New York and Wisconsin created, in 1906, the first commissions capable of demonstrating that quality of "expertise" called for by the first Justice Harlan in *Smyth v. Ames.* Every state has since established a regulatory agency.

PRIEST, 1 PRINCIPLES OF PUBLIC UTILITY REGULATION 25 (1969).

Just as conceded by the Appellants, by the sponsors of PURPA in Congress and by experts on the history of state

regulation of utilities, so have the courts indicated that utility regulation is a traditional function of the states. This Court in *Usery* unequivocally recognized that "such functions as" fire prevention, police protection, sanitation, public health, and parks and recreation are services "which the states have traditionally afforded their citizens." 426 U.S. at 851. (Also, in overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968), this Court implicitly ruled that traditional state functions also include state operation of schools and hospitals. *Accord, Alewine v. City Council of Augusta*, 505 F. Supp. 880, 888 (S.D. Ga. 1981). Moreover, this Court stated with respect to the activities it identified: "[t]hese examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." 426 U.S. at 851 n.16.

The inclusion by the Court of police protection as a traditional state function is significant. Police protection is but *one form* of the exercise *of a state's police power*. The courts have long observed that a traditional activity of the states is exercise of the police power. *See, e.g., Pierce v. New Hampshire*, 5 How. 554, 12 L. Ed. 279 (1847). Given this uncontroverted holding of the courts, it is not significant that the courts have not directly held that the specific exercise of the police power in the form of utility regulation is a traditional state function. When this and other specific exercises of the police power other than police protection come before the courts, it can be expected that the courts will declare them to constitute traditional state functions. For example, applying *Usery*, the United States Court of Appeals for the Ninth Circuit indicated that exercise of the police power in the licensing of drivers constitutes a traditional function of state government. *See United States v. Best*, 573 F.2d 1095, 1103 (9th Cir. 1978).

Although the courts have not yet *directly* ruled that regulation of retail utility rates and service practices is a traditional state function, the courts have long observed that regulation of

utilities is a valid exercise of the state's police power. *See, e.g., Great Northern R. Co. v. Washington*, 300 U.S. 154, 159-160 (1936); *Munn v. Illinois*, 94 U.S. 113 (1876); *Montana-Dakota Utilities Co. v. Johanneson*, 153 N.W. 2d 414, 470 (N.D. 1967); *Kentucky Power & Light Co. v. City of Maysville*, 36 F.2d 816, 819 (E.D. Ky. 1929).

It follows, then, that state exercise of the police power in the form of regulation of retail utility rates and service practices should also be classified as a traditional function of the states.

Also supporting the conclusion that state regulation of utilities should be classified as a traditional state function are the analytical tests which several federal courts have advanced as a methodology to apply in supplementing the specific listing by this Court in *Hodel* of traditional functions of state government. For example, in *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), the United States Court of Appeals for the Sixth Circuit set forth an analytical test which is described in the following statement from that case:

> By analyzing the services and activities which the Court [in *Usery*] characterized as typical of those performed by governments, we note certain elements common to each which serve to clarify and define a method by which a protected government function may be identified. Among these elements are: (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a communitywide need for the service or activity.

598 F.2d at 1037.

Application of the *Amersbach* principles here requires the conclusion that state regulation of retail utility rates and service practices is a traditional function of state government. First, it is clear that virtually every person utilizes electricity, in some fashion, as an essential service. It appears that regulation by state government is particularly well-suited to benefit the community as a whole by ensuring that electricity rates are not excessive yet are sufficient to assure an adequate power supply—necessary for the operation of commerce and industry affecting jobs, the operation of hospitals, police stations and other necessary and emergency organizations and for the health and welfare of the public in general. Additionally, the state government service in regulating retail utility rates and service practices is provided to the citizens of the state at no direct cost. Second, the service of regulating utilities is undertaken for the purpose of public service rather than for pecuniary gain. Third, state government is the only body able to exercise the police power of regulating retail utility rates and service practices. Fourth, government is particularly suited to the regulation of utilities because the entire community arguably benefits from that regulation.

Other federal courts have borrowed from the analytical method applied in *Amersbach*, but have applied less stringent tests. For example, in *United Transportation Union v. Long Island R. Co.*, 634 F.2d 19, 27 (2d Cir. 1980), the Court determined that the second of the *Amersbach* tests was invalid because it is not necessary for a state activity to be in the nature of "public service" to qualify as a traditional governmental activity. In *Alewine v. City Council of Augusta, supra* at 889, the Court held that the requirement of "little or no direct expense" to the public was misplaced.

Under the less stringent tests applied in *United Transportation* and *Alewine*, it is even more clear that state regulation of

retail utility rates and service practices qualifies as a traditional activity of state government.

The *Amersbach* court also construed *Usery* as establishing the proposition that "the terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times." 598 F.2d at 1037. The Second Circuit Court in *United Transporation* agreed with that conclusion noting that:

> Obviously, the catalog of essential state-provided services is not and cannot be static. As Mr. Justice Douglas observed in *New York v. United States*, 326 U.S. 572, 591, 66 S. Ct. 310, 318, 90 L. Ed. 326 (1946) (Douglas J., dissenting), "[w]hat might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable."

634 F.2d at 26. Applying this flexible analysis, it is equally clear that state regulation of retail utility rates and service practices qualifies as a traditional state function.

IV. COMPLIANCE WITH PURPA WOULD DIRECTLY IMPAIR THE STATES' ABILITY TO STRUCTURE INTEGRAL OPERATIONS IN AREAS OF TRADITIONAL FUNCTIONS

Having defined "attributes of state sovereignty" to correspond essentially to "integral operations in areas of traditional functions", the discussion above (of the second requirement of *Hodel*) lays the predicate for demonstrating that compliance by the states with PURPA would impair their ability to structure integral operations in areas of traditional functions.

If, as demonstrated above, a state's power to regulate retail utility rates and service practices is an integral operation in an area of traditional state functions, and is thus an essential attribute of state sovereignty, then there is no doubt that PURPA impairs the states' ability to structure such operations.

Where a state agency is compelled to consider a myriad of factors concerning retail utility regulation, which it would not otherwise consider, and is compelled to hold hearings and take evidence on such matters and to issue written determinations thereon and to take part in appellate review proceedings thereafter, all of which must be done within a dictated time frame, it cannot be said that such agency's ability to perform its functions in a manner and on the schedule it deems appropriate, and to otherwise structure its own operations, is not impaired. This is particularly true where, as in Mississippi and numerous other states, utility regulatory agencies are required by statute to act on certain rate matters within a fixed time period.

If an agency is compelled to consider and hold hearings on the federal standards set forth in PURPA, it must necessarily either increase its workload, staff and expenditures or relegate to secondary status, and delay or forego considering, matters which it may, in the exercise of its judgment and expertise, deem more important and worthy of action than the federal standards set forth in PURPA. This forced administrative process, together with the requirement that anyone may intervene in the proceeding at will, can only create certain chaos and incalculable delay and detriment with respect to the performance of a state agency's own functions, all of which certainly constitutes an "impairment" of the state's ability to structure its integral operations.

V. THERE ARE NO EXTRAORDINARY CIRCUMSTANCES PRESENT HERE WHICH JUSTIFY THE FEDERAL GOVERNMENT IN DEVOURING ESSENTIALS OF STATE SOVEREIGNTY

Having established that the three requirements set forth in *Hodel* are satisfied, it is next demonstrated that the extraordinary circumstances required to uphold the constitutionality of the portions of PURPA involved here are not present.

It is important to stress that, where the three requirements of *Hodel* are satisfied, the Court intends a federal statute to be upheld only in the most extraordinary of situations. A review of the Court's analysis in *Hodel* supports this conclusion;[6] a review of the Court's analysis in *Usery* confirms it. In its analysis in *Usery*, the Court defended its decision in *Fry v. United States*, 421 U.S. 542 (1975), to uphold the constitutionality of temporarily freezing the wages of state and local government employees because the legislation providing for that freeze was an "'emergency measure to counter severe inflation that threatened the national economy,'" 426 U.S. at 853, and was "an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall." *Id.*

In addition, the Court found that the nature of the federal intrusion upon the states was minimal:

> The effect of the across-the-board freeze authorized by that Act, moreover, *displaced no state choices* as to *how governmental operations* should be *structured, nor* did it *force* the *states* to *remake* such *choices themselves.* Instead, it merely required that the wage *scales and* employment *relationships* which the *States themselves had chosen be maintained* during the *period of the emergency.* Finally, the Economic Stabilization Act operated to *reduce* the *pressures* upon *state budgets* rather than

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[6] "Demonstrating that these three requirements are met does not, however, *guarantee* that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies State submission. See Fry v United States, 421 US 542, 44 L Ed 2d 363, 95 S Ct 1792 (1975), reaffirmed in National League of Cities v Usery, supra, at 852—853, 49 L Ed 2d 245, 96 S Ct 2465 (1977). See also id., at 856, 49 L Ed 2d 245, 96 S Ct 2465 (Blackmun, J, concurring)." 69 L. Ed. 2d at 23 n.29 (emphasis added).

> increase them.... The limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency.

426 U.S. at 853 (emphasis added).

Summarizing the Court's controlling principles to be applied in determining whether a situation exists where a federal statute may be upheld although the three requirements of *Hodel* are satisfied:

1. There is a national emergency endangering the well-being of all the component parts of our federal system.
2. Only collective action by the federal government may forestall the emergency.
3. No state choices as to how governmental operations should be structured are displaced by the federal action.
4. The federal action reduces, not increases, pressures upon state budgets.
5. The federal intrusion is a temporary one tailored to combat a national emergency.

Application of these principles to the facts of this case indicates that extraordinary circumstances permitting validation of PURPA do not exist.

First, there is not now and was not at the date of PURPA's enactment a national emergency endangering the well-being of all the component parts of our federal system. Appellants have characterized PURPA as "part of a package of legislation designed to combat the energy crisis." Brief for the Appellants at 2. However, at the time of PURPA's enactment, although the energy situation was serious, it was not of crisis propor-

tions. Indeed, oil imports at that time had actually declined from prior periods.[7]

In this connection, the courts found that, in the initial period of pervasive federal regulation of energy, 1973-1974, there was an oil emergency justifying extraordinary federal action. It is instructive to review cases where federal courts repeatedly cited the existence of an oil emergency permitting the federal government extraordinary latitude during the initial phase of its regulation of the pricing and allocation of petroleum. Of particular relevance are the decisions of the United States Court of Appeals with exclusive jurisdiction of emergency government regulation of petroleum allocation and pricing—the Temporary Emergency Court of Appeals ("TECA"). For example, *Gulf Oil Corporation v. Simon*, 502 F.2d 1154 (TECA 1974), contained the following statements:

> At a time [December 27, 1973 and January 14, 1974, the dates upon which the Federal Energy Office ("FEO") promulgated petroleum allocation regulations] when this country was deprived of crude oil from important foreign sources and our total supply was substantially less than the immediate needs of refiners as well as consumers, it was not unreasonable for FEO to impose a scheme of allocation....
>
> ....
>
> The allocation of all available supplies of crude oil was ordered by FEO pursuant to a determination by Congress in the Emergency Petroleum Allocation Act that *immediate emergency action* was *necessary* to avoid

[7] In 1977, crude oil imports averaged 6,594 thousand barrels per day; in 1978, 6,195 thousand barrels per day. Adding further confirmation that the nation was not at the time PURPA was adopted and is not today experiencing an energy supply crisis is the fact that in 1981 crude oil imports have averaged only 4,217 thousand barrels per day. *See* ENERGY INFORMATION ADMINISTRATION, DEP'T OF ENERGY, [SEPT. 1981] MONTHLY ENERGY REVIEW 32.

> foreseen *catastrophic nationwide consequences* of a *critical shortage* of crude oil, residual fuel oil and petroleum products essential for domestic heating, transportation and industrial production.

502 F.2d at 1155-1156 (emphasis added). In this connection, *see also Mandel v. Simon*, 493 F.2d 1239 (TECA 1974).

However, by November 27, 1974, the same Court was already observing that the extraordinary oil emergency of 1973-1974 had passed. For example, in *Reeves v. Simon*, 507 F.2d 455, 459 (TECA 1974), the Court spoke of the gasoline shortage in the past tense. In *Nader v. Sawhill*, 514 F.2d 1064 (TECA 1975), the Court found an oil emergency to have existed on December 19, 1973 which justified action by the Cost of Living Council in adopting an oil pricing regulation without providing notice and opportunity for comment but cautioned the federal government that under "less calamitous circumstances" government invocation of emergency powers to dispense with such opportunity for notice and comment "will not be tolerated." *Id.* at 1069. Indeed, the Court found that the oil emergency had passed by April 30, 1974, as the Court failed to find an emergency justifying failure by the FEO to provide notice and opportunity to comment for an April 30, 1974 energy regulation. *Consumers Union v. Sawhill*, 393 F. Supp. 639 (D.D.C. 1975), *aff'd per curiam*, 523 F.2d 1404 (TECA 1975).

Implicit in later decisions which did not find "good cause" justifying failure of the government to provide notice and opportunity to comment upon post mid-1974 energy regulations is the conclusion that by mid-1974 a national oil emergency no longer existed. *See Standard Oil Co. v. DOE*, 596 F.2d 1029 (TECA 1978) (which construed a December, 1974, rulemaking action); *Mobil Oil Corp. v. DOE*, 610 F.2d 796 (TECA 1979) (which construed an April 30, 1974, rulemaking action).

This Court should find, then, that the oil imports statistics previously cited and these decisions by the fedeal appeals court with expertise as to the nature of government regulation imposed in response to oil emergencies indicate that, by the date PURPA was enacted, *i.e.*, November, 1978, the oil emergency had passed. Consequently, application of the first principle enumerated above demonstrates that there did not (and does not) exist an extraordinary situation permitting intrusion upon protected activities of the states.

Applying the second principle, even if there were a national emergency at the time PURPA was enacted, clearly it was not and is not the case that only collective action by the federal government could forestall it. The Department of Energy itself at the time of PURPA's enactment indicated the possibility that PURPA would not result in the saving of a single barrel of imported oil. *See* DEP'T OF ENERGY, THE NATIONAL ENERGY ACT at III (1978). Even the government's more optimistic estimates projected that under PURPA only 40,000 barrels of imported oil a day would be saved by 1995. *See* Federal Energy Regulatory Commission, Notice of Finding of No Significant Impact, etc., docket Nos. RM 79-54 and RM 79-55 (March 31, 1979).

Assuming arguendo that PURPA could save the nation 40,000 barrels per day (and there are to date no indications that it is saving the nation any imported oil), an oil savings of that level still must be considered slight. *See, e.g., Independent Gasoline Marketers Council v. Duncan*, 492 F. Supp. 614 (D.D.C. 1980) where the Court found a reduction of 56,000 to 100,000 barrels per day, 492 F. Supp. at 617 n.4, to be "slight," *Id.* at 618. Also, Congress itself modified another energy statute, the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289, enacted at the same time as PURPA, so as to reduce oil and gas savings by as much as 160,000 barrels per day, which reduction was characterized in the

legislative history as "slight." *See* S. REP. NO. 95-361, 95th Cong. 2d Sess. 35, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 8180-8181.

In view of the at-best slight oil savings which PURPA would accomplish, it is clear that collective action by the federal government in the form of enactment and enforcement of PURPA could not and cannot forestall any energy emergency.

With regard to the third principle, it has been demonstrated hereinabove that state choices as to how governmental operations should be structured are clearly displaced by PURPA. For example, PURPA requires the states to amend the operating rules of their utility regulatory commissions.

With regard to the fourth principle, PURPA increases the pressure upon state budgets. For example, the Appellees have indicated that:

> PURPA will cause the cost of operations of the [state utility regulatory] Commission to increase substantially. For example, it is estimated that compliance with PURPA would necessitate an increase of at least five executive employees and three secretaries. Moreover, the cost of even submitting a proposal to DOE to comply with PURPA would exceed $360,000.

Plaintiffs' Memorandum In Support of Motion for Summary Judgement in Civ. Act. JM-01212(C) at 11 (S.D. Miss. 1979). For the Mississippi Public Service Commission, the level of expenses described above is extraordinarily high, as the commission is supported only by a "tax raising $700,000 per year." *Id.*, citing Miss. Code Ann. §77-3-87 (1972).

Finally, applying the fifth principle, it is clear that PURPA is not a temporary statute; to the contrary, Congress provided no termination date for it.

CONCLUSION

The foregoing demonstrates that the requirements of a Tenth Amendment challenge to a federal statute have been satisfied: (i) PURPA regulates the states as states, (ii) the statute addresses matters that are indisputably attributes of state sovereignty and (iii) the states' compliance with PURPA would directly impair their ability to structure the integral operations of promulgating the operating rules of their agencies engaged in an area of traditional functions, utility regulation. In addition, it has been demonstrated that there are no extraordinary circumstances present which justify upholding PURPA despite satisfaction of these requirements. If the provisions of PURPA involved here are permitted to stand, the result will be, as was well-stated in *Brown v. EPA, supra*, to "reduce the states to puppets of a ventriloquist Congress." *Id.* at 839. Amici Curiae, Duke Power Company and Carolina Power & Light, thus respectfully urge that the lower court's judgment striking down portions of PURPA as unconstitutional be affirmed.

Respectfully submitted,

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